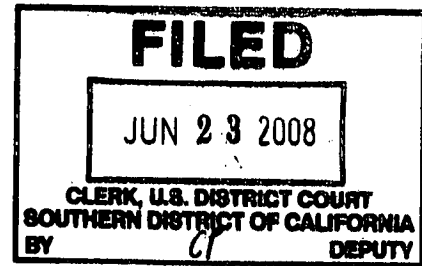


1 LYNN HUBBARD, III, SBN 69773
2 SCOTTLINN J HUBBARD, IV, SBN 212970
3 **DISABLED ADVOCACY GROUP, APLC**
4 12 Williamsburg Lane
5 Chico, CA 95926
6 Telephone: (530) 895-3252
7 Facsimile: (530) 894-8244



8 Attorneys for Plaintiff

9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11
12
13 A.J. OLIVER,

14 Plaintiff,

15 vs.

16 MERVYN'S, LLC; SWEETWATER
17 SQUARE, LLC; AARDEMA
18 GRANDCHILDREN'S LP,
19 Defendants.

No. '08 CV 1108 WQH WMc

Plaintiff's Complaint

1 I. SUMMARY

2 1. This is a civil rights action by plaintiff A.J. Oliver ("Oliver") for
3 discrimination at the building, structure, facility, complex, property, land,
4 development, and/or surrounding business complex known as:

5 Mervyn's
6 3007 Highland Avenue
7 National City, CA 91950
8 (hereafter "the Store")

9 2. Oliver seeks damages, injunctive and declaratory relief, attorney
10 fees and costs, against Mervyn's, LLC; Sweetwater Square, LLC; and Aardema
11 Grandchildren's LP (hereinafter collectively referred to as "Mervyn's") pursuant
12 to the Americans with Disabilities Act of 1990, (42 U.S.C. §§ 12101 et seq.), and
13 related California statutes.

14 II. JURISDICTION

15 3. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and
16 1343 for ADA claims.

17 4. Supplemental jurisdiction for claims brought under parallel
18 California law—arising from the same nucleus of operative facts—is predicated
19 on 28 U.S.C. § 1367.

20 5. Oliver's claims are authorized by 28 U.S.C. §§ 2201 and 2202.

21 III. VENUE

22 6. All actions complained of herein take place within the jurisdiction
23 of the United States District Court, Southern District of California, and venue is
24 invoked pursuant to 28 U.S.C. § 1391(b), (c).

25 IV. PARTIES

26 7. Mervyn's owns, operates, and/or leases the Store, and consists of a
27 person (or persons), firm, and/or corporation.

8. Oliver suffered a stroke approximately 13 years ago. The stroke left him paralyzed, speech impaired, and unable to stand or walk. Oliver requires the use of a motorized wheelchair when traveling about in public. Consequently, Oliver is "physically disabled," as defined by all applicable California and United States laws, and a member of the public whose rights are protected by these laws.

V. FACTS

9. The Store is open to the public, is intended for nonresidential use and whose operation affects commerce.

10. Oliver visited the Store and encountered barriers (both physical and intangible) that interfered with—if not outright denied—his ability to use and enjoy the goods, services, privileges, and accommodations offered at the facility. To the extent known by Oliver, the barriers at the Store included, but are not limited to, the following:

- The disabled parking spaces are not located on the closest route to the Store;
- There are not enough disabled parking spaces;
- There is no International Symbol of Accessibility on at least one entrance door to indicate that the Store is accessible to the disabled;
- There are no checkstands designated as being accessible to the disabled;
- At least one pay point machine is mounted too high;
- The restroom doors require more than five pounds of pressure to operate;
- In the family restroom, the toilet tissue dispenser protrudes into the clear maneuvering space needed to access the water closet;
- In the family restroom, there is not the required 18 inches of strike side clearance on the door upon exit;
- In the men's restroom, the stall door is not self-closing;

- 1 • In the men's restroom, there is no loop or "U" shaped handle mounted
- 2 below the lock;
- 3 • In the men's restroom, the toilet tissue dispenser protrudes into the clear
- 4 maneuvering space needed to access the water closet; and,
- 5 • In the men's restroom, there is not the required 18 inches of strike side
- 6 clearance on the door upon exit.

7 These barriers prevented Oliver from enjoying full and equal access.

8 11. Oliver was also deterred from visiting the Store because he knew
9 that the Store's goods, services, facilities, privileges, advantages, and
10 accommodations were unavailable to physically disabled patrons (such as
11 himself). He continues to be deterred from visiting the Store because of the
12 future threats of injury created by these barriers.

13 12. Oliver also encountered barriers at the Store, which violate state and
14 federal law, but were unrelated to his disability. Nothing within this Complaint,
15 however, should be construed as an allegation that Oliver is seeking to remove
16 barriers unrelated to his disability.

17 13. Mervyn's knew that these elements and areas of the Store were
18 inaccessible, violate state and federal law, and interfere with (or deny) access to
19 the physically disabled. Moreover, Mervyn's has the financial resources to
20 remove these barriers from the Store (without much difficulty or expense), and
21 make the Store accessible to the physically disabled. To date, however,
22 Mervyn's refuses to either remove those barriers or seek an unreasonable
23 hardship exemption to excuse non-compliance.

24 14. At all relevant times, Mervyn's has possessed and enjoyed sufficient
25 control and authority to modify the Store to remove impediments to wheelchair
26 access and to comply with the Americans with Disabilities Act Accessibility
27 Guidelines and Title 24 regulations. Mervyn's has not removed such
28 impediments and has not modified the Store to conform to accessibility

standards. Mervyn's has intentionally maintained the Store in its current condition and has intentionally refrained from altering the Store so that it complies with the accessibility standards.

15. Oliver further alleges that the (continued) presence of barriers at the Store is so obvious as to establish Mervyn's discriminatory intent.¹ On information and belief, Oliver avers that evidence of this discriminatory intent includes Mervyn's refusal to adhere to relevant building standards; disregard for the building plans and permits issued for the Store; conscientious decision to the architectural layout (as it currently exists) at the Store; decision not to remove barriers from the Store; and allowance that the Store continues to exist in its non-compliant state. Oliver further alleges, on information and belief, that Mervyn's is not in the midst of a remodel, and that the barriers present at the Store are not isolated (or temporary) interruptions in access due to maintenance or repairs.²

VI. FIRST CLAIM

Americans with Disabilities Act of 1990

Denial of "Full and Equal" Enjoyment and Use

16. Oliver incorporates the allegations contained in paragraphs 1 through 15 for this claim.

17. Title III of the ADA holds as a "general rule" that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment (or use) of goods, services, facilities, privileges, and accommodations offered by any person who owns, operates, or leases a place of public accommodation. 42 U.S.C. § 12182(a).

18. Mervyn's discriminated against Oliver by denying "full and equal enjoyment" and use of the goods, services, facilities, privileges or accommodations of the Store during each visit and each incident of deterrence.

¹ E.g., *Gunther v. Lin*, 144 Cal.App.4th 223, fn. 6

² Id.; 28 C.F.R. § 36.211(b)

Oliver v. Mervyn's, LLC, et al.

Plaintiff's Complaint

1 Failure to Remove Architectural Barriers in an Existing Facility

2 19. The ADA specifically prohibits failing to remove architectural
3 barriers, which are structural in nature, in existing facilities where such removal
4 is readily achievable. 42 U.S.C. § 12182(b)(2)(A)(iv). The term “readily
5 achievable” is defined as “easily accomplishable and able to be carried out
6 without much difficulty or expense.” Id. § 12181(9).

7 20. When an entity can demonstrate that removal of a barrier is not
8 readily achievable, a failure to make goods, services, facilities, or
9 accommodations available through alternative methods is also specifically
10 prohibited if these methods are readily achievable. Id. § 12182(b)(2)(A)(v).

11 21. Here, Oliver alleges that Mervyn’s can easily remove the
12 architectural barriers at the Store without much difficulty or expense, and that
13 Mervyn’s violated the ADA by failing to remove those barriers, when it was
14 readily achievable to do so.

15 22. In the alternative, if it was not “readily achievable” for Mervyn’s to
16 remove the Store’s barriers, then Mervyn’s violated the ADA by failing to make
17 the required services available through alternative methods, which are readily
18 achievable.

19 Failure to Design and Construct an Accessible Facility

20 23. On information and belief, the Store was designed or constructed (or
21 both) after January 26, 1992—independently triggering access requirements
22 under Title III of the ADA.

23 24. The ADA also prohibits designing and constructing facilities for
24 first occupancy after January 26, 1993, that aren’t readily accessible to, and
25 usable by, individuals with disabilities when it was structurally practicable to do
26 so. 42 U.S.C. § 12183(a)(1).

1 25. Here, Mervyn's violated the ADA by designing or constructing (or
2 both) the Store in a manner that was not readily accessible to the physically
3 disabled public—including Oliver—when it was structurally practical to do so.³

4 Failure to Make an Altered Facility Accessible

5 26. On information and belief, the Store was modified after January 26,
6 1992, independently triggering access requirements under the ADA.

7 27. The ADA also requires that facilities altered in a manner that affects
8 (or could affect) its usability must be made readily accessible to individuals with
9 disabilities to the maximum extent feasible. 42 U.S.C. § 12183(a)(2). Altering
10 an area that contains a facility's primary function also requires adding making
11 the paths of travel, bathrooms, telephones, and drinking fountains serving that
12 area accessible to the maximum extent feasible. Id.

13 28. Here, Mervyn's altered the Store in a manner that violated the ADA
14 and was not readily accessible to the physically disabled public—including
15 Oliver—to the maximum extent feasible.

16 Failure to Modify Existing Policies and Procedures

17 29. The ADA also requires reasonable modifications in policies,
18 practices, or procedures, when necessary to afford such goods, services,
19 facilities, or accommodations to individuals with disabilities, unless the entity
20 can demonstrate that making such modifications would fundamentally alter their
21 nature. 42 U.S.C. § 12182(b)(2)(A)(ii).

22 30. Here, Mervyn's violated the ADA by failing to make reasonable
23 modifications in policies, practices, or procedures at the Store, when these
24 modifications were necessary to afford (and would not fundamentally alter the
25 nature of) these goods, services, facilities, or accommodations.

26
27
28 ³ Nothing within this Complaint should be construed as an allegation that plaintiff is bringing this action as a
private attorney general under either state or federal statutes.

1 31. Oliver seeks all relief available under the ADA (*i.e.*, injunctive
2 relief, attorney fees, costs, legal expense) for these aforementioned violations. 42
3 U.S.C. § 12205.

4 32. Oliver also seeks a finding from this Court (*i.e.*, declaratory relief)
5 that Mervyn's violated the ADA in order to pursue damages under California's
6 Unruh Civil Rights Act or Disabled Persons Act.

7 VII. SECOND CLAIM

8 **Disabled Persons Act**

9 33. Oliver incorporates the allegations contained in paragraphs 1
10 through 30 for this claim.

11 34. California Civil Code § 54 states, in part, that: Individuals with
12 disabilities have the same right as the general public to the full and free use of
13 the streets, sidewalks, walkways, public buildings and facilities, and other public
14 places.

15 35. California Civil Code § 54.1 also states, in part, that: Individuals
16 with disabilities shall be entitled to full and equal access to accommodations,
17 facilities, telephone facilities, places of public accommodation, and other places
18 to which the general public is invited.

19 36. Both sections specifically incorporate (by reference) an individual's
20 rights under the ADA. See Civil Code §§ 54(c) and 54.1(d).

21 37. Here, Mervyn's discriminated against the physically disabled
22 public—including Oliver—by denying them full and equal access to the Store.
23 Mervyn's also violated Oliver's rights under the ADA, and, therefore, infringed
24 upon or violated (or both) Oliver's rights under the Disabled Persons Act.

25 38. For each offense of the Disabled Persons Act, Oliver seeks actual
26 damages (both general and special damages), statutory minimum damages of one
27 thousand dollars (\$1,000), declaratory relief, and any other remedy available
28 under California Civil Code § 54.3.

1 47. Oliver also seeks to enjoin Mervyn's from violating the Unruh Act
2 (and ADA), and recover reasonable attorneys' fees and costs incurred under
3 California Civil Code § 52(a).

4 IX. FOURTH CLAIM

5 **Denial of Full and Equal Access to Public Facilities**

6 48. Oliver incorporates the allegations contained in paragraphs 1
7 through 13 for this claim.

8 49. Health and Safety Code § 19955(a) states, in part, that: California
9 public accommodations or facilities (built with private funds) shall adhere to the
10 provisions of Government Code § 4450.

11 50. Health and Safety Code § 19959 states, in part, that: Every existing
12 (non-exempt) public accommodation constructed prior to July 1, 1970, which is
13 altered or structurally repaired, is required to comply with this chapter.

14 51. Oliver alleges the Store is a public accommodation constructed,
15 altered, or repaired in a manner that violates Part 5.5 of the Health and Safety
16 Code or Government Code § 4450 (or both), and that the Store was not exempt
17 under Health and Safety Code § 19956.

18 52. Mervyn's non-compliance with these requirements at the Store
19 aggrieved (or potentially aggrieved) Oliver and other persons with physical
20 disabilities. Accordingly, he seeks injunctive relief and attorney fees pursuant to
21 Health and Safety Code § 19953.

22 X. PRAYER FOR RELIEF

23 WHEREFORE, Oliver prays judgment against Mervyn's for:

24 1. Injunctive relief, preventive relief, or any other relief the Court deems
25 proper.

26 2. Declaratory relief that Mervyn's violated the ADA for the purposes of
27 Unruh Act or Disabled Persons Act damages.

- 1 3. Statutory minimum damages under either sections 52(a) or 54.3(a) of the
2 California Civil Code (but not both) according to proof.
3 4. Attorneys' fees, litigation expenses, and costs of suit.⁴
4 5. Interest at the legal rate from the date of the filing of this action.
5

6 DATED: June 19, 2008

DISABLED ADVOCACY GROUP, APLC

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9 LYNN HUBBARD, III
10 Attorney for Plaintiff
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⁴ This includes attorneys' fees under California Code of Civil Procedure § 1021.5.
Oliver v. Mervyn's, LLC, et al.
Plaintiff's Complaint

**UNITED STATES
DISTRICT COURT**
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

152187 -- TC

**June 23, 2008
15:20:41**

Civ Fil Non-Pris

USAO #.: 08CV1108

Judge...: WILLIAM Q HAYES

Amount.: \$350.00 CC

Total-> \$350.00

FROM: OLIVER VS. MERVYNS LLC

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the filing of a civil case for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

A.J. OLIVER

(b) County of Residence of First Listed Plaintiff SAN DIEGO
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

LYNN HUBBARD, III DISABLED ADVOCACY GROUP, APLC
12 Williamsburg Lane Chico, CA 95926 (530) 895-3252

DEFENDANTS

MERVYN'S, LLC; SWEETWATER SQUARE, LLC
AARDEMA GRANDCHILDREN'S LP

County of Residence of First Listed Defendant
NOTE: IN LAND CONDEMNATION CASES, USE THE COUNTY OF THE LAND INVOLVED.

Attorneys (If Known)

'08 CV 1108 WQH WMC

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☒ 3 Federal Question (U.S. Government Not a Party)
☐ 2 U.S. Government Defendant
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|-----------------------------------------|----------------------------|----------------------------|---------------------------------------------------------------|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input checked="" type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 800 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 U.S.C. Section 12101, et seq.

Brief description of cause:

Ongoing violations of the ADA Construction Standards

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

06/19/2008

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____